

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

IP-Enabled Services

)
)
)
)
)

WC Docket No. 04-36

REPLY COMMENTS OF CALLIPSO CORPORATION

Michael P. Donahue
Joshua S. Lamel
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Tel: (202) 424-7500
Fax: (202) 424-7645

Counsel for Callipso Corporation

Dated: July 14, 2004

TABLE OF CONTENTS

TABLE OF CONTENTS	i
EXECUTIVE SUMMARY	ii
INTRODUCTION	1
REPLY COMMENTS	2
I. THE COMMISSION MUST ENSURE VOIP PROVIDERS HAVE ACCESS TO FACILITIES AT LOCAL BUSINESS RATES	2
A. The Existing Regulatory Uncertainty Has Caused LECs to Refuse to Provide Circuits to VoIP Providers or Increase the Cost of Such Facilities to Uneconomic Levels.	3
1. RBOCs are Relying Upon an Erroneous, Overbroad Interpretation of the AT&T Order to Assess Access Charges on VoIP Providers.	4
2. The Commission Must Prevent the RBOCs from Dictating Access Charge Policy	7
B. The Commission Must Reiterate The Limited Scope Of The AT&T Order	8
II. THE COMMISSION SHOULD RULE THAT ALL IP-ENABLED SERVICES ARE SUBJECT TO ITS EXCLUSIVE JURISDICTION.....	9
A. The Commission is Vested with Exclusive Jurisdiction over Information Services.	10
B. The Commission Must Immediately Preempt State Regulation of IP-Enabled Services.	11
III. VOIP IS QUICKLY BECOMING THE ONLY COMPETITIVE ALTERNATIVE TO THE RBOCS AVAILABLE TO CONSUMERS	13
IV. CONCLUSION.....	14

EXECUTIVE SUMMARY

Voice over Internet Protocol (“VoIP”) is rapidly becoming consumers’ best, if not sole, competitive option to the RBOCs’ traditional voice service, in light of the continuing decline of the CLEC market. Over the past few years, there has been a significant decline in the availability of products and services that compete with the monopoly RBOCs. Without immediate action from the Commission promoting the development of VoIP, consumers will be denied a viable competitive alternative in the local communications service market.

The Commission must promptly state that Internet Protocol (“IP”) traffic terminating to the public switched telephone network (“PSTN”) remains an enhanced service entitled to the Commission’s ESP exemption from access charges and that providers of VoIP remain entitled to obtain the circuits necessary to transmit such traffic from the LECs’ retail tariffs. Alternatively, the Commission should establish a just and reasonable price for the use of such facilities by VoIP providers.

RBOCs are improperly claiming that there is an absence of specific guidelines on how IP-enabled services are treated for intercarrier compensation purposes and as a result dictate an outcome that favors RBOCs at the expense of VoIP providers and consumers. Aside from engaging in illegal self-help measures as it pertains to the compensation for exchanged traffic, RBOCs are also imposing their own overly broad interpretation of the *AT&T Order* on CLECs to either deny VoIP providers access to PRIs or other circuits necessary to reach the PSTN or to collect access charges for the use of those facilities. As a result of the RBOCs actions, CLECs have either refused to provide or have substantially increased their rates for the facilities on which VoIP providers rely in order to connect to the PSTN. Consequently, VoIP providers no longer have access to the facilities necessary to connect to the PSTN and bring their competitive, innovative services to consumers.

In order to prevent the crippling of the nascent VoIP industry, the Commission must promptly address these issues and clarify the status of VoIP for purposes of intercarrier compensation. Most importantly, the Commission should find that IP-enabled services remain subject to an exemption from access charges and direct LECs to make essential facilities available to VoIP providers at local business rates. The Commission must also reiterate that the *AT&T Order* is limited to the facts described in AT&T's Petition and does not apply to IP-enabled services that are not identical to AT&T's phone-to-phone service.

Callipso and a majority of commenters in this proceeding agree that VoIP services are interstate communications and thus are subject to the Commission's exclusive jurisdiction. VoIP is an information service, and as the Commission has held, FCC authority is preeminent in the area of information services. Several states have attempted to regulate VoIP, creating regulatory uncertainty and stifling the development of IP-enabled services. The Commission has a statutory obligation to encourage the deployment of advanced services by utilizing regulatory measures that promote local competition and eliminate barriers to investment. If the FCC does not step in and preempt state commission regulation of IP-enabled services, the uncertainty, burden and potential inconsistency of state regulation of VoIP services will hamper severely the development of VoIP services.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
)	WC Docket No. 04-36
IP-Enabled Services)	
)	

REPLY COMMENTS OF CALLIPSO CORPORATION

Callipso Corporation, through undersigned counsel, hereby submits its Reply Comments in the above-referenced proceeding.

INTRODUCTION

Voice over Internet Protocol ("VoIP"), together with cable and wireless telephony, currently represent the most promising technologies for bringing to American consumers the benefits of competition in a telecommunications marketplace dominated, even today, by a few monopoly carriers. The hopes which Congress placed upon the emergence of a strong competitive market have not been fully realized since the enactment of the Telecommunications Act of 1996, and now appear further imperiled as competitive local exchange carriers' ("CLEC") access to ILEC facilities on favorable terms is questioned. Accordingly, all forms of VoIP which bring American consumers the prospect of lower communications costs, enhanced services and more service choices should be uniformly encouraged with a national de-regulatory policy.

Now, however, the Regional Bell Operating Companies ("RBOCs") are eliminating the ability of VoIP providers to obtain access to the Public Switched Telephone Network ("PSTN") by either denying access to facilities or unilaterally imposing above-cost access charges on all

forms of VoIP.¹ The Commission must act promptly to cut off this discriminatory attempt to cripple the nascent VoIP industry, which already pays just and reasonable compensation for local origination and termination of calls to end users on the PSTN. Further delay in outlining the extent to which IP-enabled services, such as VoIP, are to be subject to regulation, including the requirement to pay above-cost access charges, will serve only to strengthen the RBOCs' resolve to crush the potential consumer benefits and competitive opportunities provided by IP-enabled services.

REPLY COMMENTS

I. THE COMMISSION MUST ENSURE VOIP PROVIDERS HAVE ACCESS TO FACILITIES AT LOCAL BUSINESS RATES

One of the critical issues before the Commission in this and related proceedings² is how it should treat IP-enabled services for purposes of intercarrier compensation. As discussed below, it is imperative that the Commission resolve these issues promptly to provide certainty to the market, ensure the development of the nascent VoIP industry, and prevent the kinds of self-help remedies that have recently nearly eliminated the availability of essential facilities to competitive services providers. The Commission should not apply, or permit local exchange carriers to apply, the broken access charge regime to VoIP providers and services. Rather, the Commission should find, as requested in the Level 3 Petition, that IP traffic that terminates to the PSTN is

¹ Callipso notes that although Qwest has announced a willingness to eliminate access charges on certain categories of "true" VoIP traffic terminating to the PSTN, Callipso challenges the proposition that only Americans with broadband connections can and should be entitled to the benefits of VoIP, and Callipso awaits the actual implementation of Qwest's announced policy to evaluate fully its true benefits to American consumers. *See Qwest Announces New Policy Eliminating Access Charges on True VoIP Calls and Availability of New Local Services to VoIP Providers*, Qwest Press Release, available at http://www.qwest.com/about/media/pressroom/1,1720,1512_archive,00.html (April 26, 2004).

² *See Level 3 Communications, Inc. Petition for Forebearance under 47 U.S.C. § 160(c) From Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266 (filed Dec. 23, 2003); *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning the Order of the Minnesota Public Utility Commission*, WC Docket No. 03-211 (filed Sept. 22, 2003).

subject to reciprocal compensation, not access charges, either by reaffirming that VoIP traffic remains subject to the ESP exemption from access charges and eligible to obtain services from the LEC retail tariffs or establishing just and reasonable compensation for use of the PSTN by VoIP providers to originate and terminate VoIP enabled traffic.

A. The Existing Regulatory Uncertainty Has Caused LECs to Refuse to Provide Circuits to VoIP Providers or Increase the Cost of Such Facilities to Uneconomic Levels.

Despite the Commission's reiteration of the fact that ESPs remain exempt from access charges and the Commission's effort to expressly limit the scope of the *AT&T Order*,³ LECs are either refusing to provide circuits to VoIP providers or providing such facilities at substantially inflated rates to offset potential access charges. In short, the Regional Bell Operating Companies ("RBOCs") are utilizing the alleged absence of specific guidelines regarding the manner in which IP-enabled services are treated for intercarrier compensation purposes to dictate an outcome that discriminates against competitive VoIP providers and favors the RBOCs' own VoIP products or other IP-enabled services. As a result, competitive VoIP providers are effectively denied access to the facilities necessary to bring the benefits of IP-enabled services to consumers. The Commission must act swiftly to eliminate the RBOCs' ability to force competitors out of the market.

Contrary to the RBOCs claims, competitive VoIP providers do not get a "free ride" on the PSTN when they do not pay access charges. VoIP providers typically purchase Primary Rate Interfaces ("PRIs") or other high-speed local business lines to connect to the PSTN. As a result, VoIP providers, like other users of these lines, pay appropriate cost-based rates for the use of

³ *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephone Services are Exempt from Access Charges*, Memorandum Opinion and Order, WC Docket No. 02-361, FCC 04-97 (rel. April 21, 2004) ("*AT&T Order*").

these lines. To the extent VoIP calls are terminated to CLECs for delivery to ILECs, the ILEC is paid cost-based reciprocal compensation to terminate the call. Thus, competitive VoIP providers are already compensating LECs for the costs they impose on the LECs' networks,⁴ and RBOC claims to the contrary are nothing more than a ruse to justify discriminating against their competitors.

1. *RBOCs are Relying Upon an Erroneous, Overbroad Interpretation of the AT&T Order to Assess Access Charges on VoIP Providers.*

The Commission explicitly stated that the *AT&T Order* was narrowly tailored to apply to AT&T's service as described in its Petition. Specifically, the Commission stated that its ruling is:

limited to the type of service described by AT&T in this proceeding, i.e., an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology.⁵

The Senior Deputy Chief of the Wireline Bureau in testimony before the House Telecom Subcommittee further clarified the Commission's decision stating:

The Commission, by issuing this decision, did not prejudge the application of access charges to other types of VoIP, which are still subject to consideration in both the IP-Enabled Services Proceeding and the Intercarrier Compensation docket. Thus, this decision was explicitly limited to the factual circumstances described by AT&T.⁶

⁴ To the extent the RBOCs assert that their PRI rates do not adequately compensate for the costs they incur to terminate VoIP traffic to the PSTN, an assertion that is not supported in the record in this proceeding, the issue is more appropriately addressed in the Commission's Access Charge Reform proceeding and the RBOCs should be prohibited from using this claim as a basis unilaterally to impose access charges on VoIP providers.

⁵ See *AT&T Order*, ¶ 1.

⁶ Written Statement of Jeffrey J. Carlisle, Senior Deputy Chief Wireline Competition Bureau Federal Communications Commission, on Voice over Internet Protocol (VoIP) Before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, United States House of Representatives, July 7, 2004, at 17.

Despite these clear statements regarding the scope of the *AT&T Order*, the RBOCs are improperly using that order as a basis to collect access charges on all IP-enabled services regardless of whether or not those services are the same as AT&T's phone-to-phone service. Not surprisingly, the RBOCs' strategy to increase unlawfully the price competitive VoIP providers pay for access to the PSTN coincides with the RBOCs' deployment of their own IP-enabled or VoIP products.⁷

The RBOCs' mischaracterization of the *AT&T Order* manifests itself in two ways that effectively eliminate VoIP providers' access to facilities. First, the RBOCs recently have refused to provide PRIs to VoIP providers altogether or have insisted that VoIP providers pay excessive access charges for the circuits. Second, the RBOCs have begun to exclude VoIP calls in calculating the ratio of local to non-local calls terminated by a CLEC in the RBOCs' payment of reciprocal compensation to CLECs and are then imposing access charges on those calls.⁸ CLECs are, in turn, forced to pass on these charges to VoIP providers.

For example, over the last year, Callipso requested 2-way PRIs from and was refused by three of the five major ILECs. One of the ILECs affirmatively refused to sell PRIs to Callipso and the other two effectively refused to provide 2-way PRIs by refusing to respond to Callipso's

⁷ See, e.g., *Verizon Selects Nortel Networks to Accelerate Building of Nation's Largest Converged, Packet-Switched Wireline Network Using Voice-Over-IP Technology*, Verizon New Release, available at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=83213> (Jan. 7, 2004) (describing comprehensive plan to convert Verizon's traditional local switches to softswitches and VoIP gateways and collaborative efforts aimed at upgrading 13,000 Nortel PBX systems and 150,000 Norstar PBX systems in Verizon's territory); *SBC Communications Announces Advances in Initiative to Develop IP-Based Residential Network for Integrated Video, Internet, VoIP Services*, SBC Press Release, available at <http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21207> (June 22, 2004) (announcing strategy to develop high-speed, IP-based local connections that could result in an incremental investment of \$4 billion to \$6 billion over five years); *BellSouth Addresses Business Voice Over IP Market With Comprehensive Portfolio Approach*, BellSouth Press Release, available at <http://bellsouthcorp.com/proactive/newsroom/release.vtml?id=45751> (June 8, 2004) (announcing launch of business class network-hosted VoIP service in multiple markets).

⁸ This is in effect a double hit for CLECs because they are losing reciprocal compensation revenues for terminating VoIP traffic on local exchange facilities and are being forced to pay the RBOCs access charges for that traffic. The only "winners" in this situation are the RBOCs.

request despite numerous follow-up inquiries from Callipso. Callipso has not requested 2-way PRIs from the two remaining ILECs because Callipso has determined that they are openly hostile to or do not support unaffiliated VoIP service.

Similarly, as described in more detail in the table set forth below, of the seventeen CLECs from whom Callipso has either purchased or requested 2-way PRIs in the last year, only one is still offering 2-way PRIs without recent significant price increases or additional onerous terms, and then only in a few markets. Those CLECs that have refused to provide 2-way PRIs to Callipso have cited uncertainty over access charges and RBOC treatment of VoIP traffic for purposes of intercarrier compensation as the reasons for their refusal.

Summary of Recent CLEC Responses to 2-way PRI Requests

CLEC	DATE	CLEC RESPONSE
A	July 2004	Stopped offering services in 8 states
	June 2004	Demanded access charges
	August 2003	Eliminated outbound traffic over PRIs
B	July 2004	Increased rates for outbound PRI from 120% to 385% in US West, SBC and GTE territories and eliminated services in Bell South territory.
	October 2003	Attempted to increase prices for outbound PRIs
	July 2003	Prevented Callipso from ordering any new inbound PRIs
C	December 2003	Increased price of outbound PRI from 35% to 440%; insisted on pass-through of all charges from ILEC, including access charges; capped amount of minutes per PRI
D	June 2003	Will not offer 2-way PRIs
E	April 2004	Will not offer 2-way PRIs
F	April 2003	Effectively denied 2-way PRI service by insisting on an impossible standard of passing

CLEC	DATE	CLEC RESPONSE
		ANI on virtually all calls, regardless of whether Callipso received ANI
G	May 2004	Will not offer 2-way PRIs
H	November 2003	Will not offer 2-way PRIs
I	Current	Provides 2-way PRIs to Callipso in only a few markets
J	May 2004	Will not offer 2-way PRIs
K	February 2004	Will not offer 2-way PRIs
L	July 2004	Will not offer 2-way PRIs
M	July 2004	Will not offer 2-way PRIs
N	July 2004	Will consider 2-way PRI offering, but has made no commitment to do so
O	March 2004	Has not responded to Callipso's request for 2-way PRIs
P	July 2004	Will not offer 2-way PRIs

2. *The Commission Must Prevent the RBOCs from Dictating Access Charge Policy.*

Clearly, the RBOCs' unilateral imposition of unlawful access charges is having their desired effect of eliminating the availability to their competitors of the facilities necessary to access the PSTN and thus reach consumers. Rather than preventing the "free ride" RBOCs claim VoIP providers receive, the RBOCs policies will ultimately hurt consumers. Over 75% of Americans do not have the computer devices and broadband access to take advantage of VoIP, other than by dialing into VoIP gateways, like those provided by Callipso.⁹ The Commission must ensure the continued availability of these options by protecting VoIP providers' access to

⁹ See Madden, Mary, *America's Online Pursuits: The Changing Picture of Who's Online and What They Do*, Pew Internet and American Life Project, available at http://www.pewinternet.org/PPF/r/106/report_display.asp (Dec. 22, 2003) (63% of Americans now go online; 31% of online users who access the internet from home access it via broadband).

the PSTN at cost-based rates, either by finding that IP-enabled services remain eligible for the ESP exemption or establishing an appropriate just and reasonable rate for VoIP providers' use of PRIs to access the PSTN.

B. The Commission Must Reiterate The Limited Scope Of The *AT&T Order*.

As the Commission recognized in the *AT&T Order* and the *Pulver Order*,¹⁰ companies use a variety of technologies and architectures to provision IP-enabled services. Consequently, in addressing the regulatory classification of a particular VoIP service, the Commission has gone to great lengths to engage in a factually-intensive review of the service and has wisely limited its rulings to the particular service configurations detailed in the relevant petitions.

As noted above, however, despite the Commission's explicit explanation of the scope of the *AT&T Order*, the RBOCs misuse that order as a basis to impose access charges universally on every VoIP provider. If access charges are to be imposed on IP-enabled services at all, a point Callipso disputes, the imposition of such charges should be limited at this time, as the Commission intended, only to those services that resemble AT&T's specific service.¹¹ Callipso believes the Commission did not intend to prejudge the continued availability to ESPs of interstate access services by paying the local business exchange service rates contained in intrastate tariffs, rather than the access rates contained in interstate tariffs.¹² Therefore, the Commission must reiterate again for the benefit of the RBOCs the extremely limited scope of the *AT&T Order* and explicitly prohibit the RBOCs from assessing access charges on VoIP providers on the basis of their limited reading of the *AT&T Order* alone.

¹⁰ See *Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, 19 FCC Rcd 3307 (2004) ("*Pulver Order*").

¹¹ The term "AT&T's specific service" is pervasive throughout the *AT&T Order*, appearing more than thirty times.

¹² See *AT&T Order*, at ¶ 14 n. 60.

II. THE COMMISSION SHOULD RULE THAT ALL IP-ENABLED SERVICES ARE SUBJECT TO ITS EXCLUSIVE JURISDICTION

Callipso joins the numerous parties that have filed comments in support of a Commission ruling that IP-enabled services are subject to the exclusive jurisdiction of the Commission.¹³ The Commission has already ruled that Pulver.com's Free World Dialup ("FWD") service is not subject to state regulation.¹⁴ As detailed in the Company's initial comments, like FWD, Callipso offers an information service to its customers.¹⁵ In the *Pulver Order*, the Commission recognized that Federal authority is preeminent in the area of information services.¹⁶ Further, just as with FWD, the Commission's traditional end-to-end analysis employed to determine the jurisdictional nature of traffic is inapplicable when applied to Callipso's service.¹⁷ Jurisdictional separation of traffic that traverses Callipso's network would be an exercise in futility for two reasons: first, TDM and native IP transmissions are commingled and cannot be segregated; and second, the actual originating or termination point of IP traffic is unknown, similar to the FWD service.¹⁸ Moreover, it is important for the Commission to act expeditiously and find that IP-

¹³ See, e.g., 8x8, Inc. Comments, at 10; Alcatel North America Comments, at 9; America's Rural Consortium Comments, at 5; AT&T Corp. Comments, at 42; BellSouth Corporation Comments, at 32; Bend Broadband et al. Comments, at 13; Cablevision Systems Corp. Comments, at 11; Cisco Systems Comments, at 2-6; Computer and Communications Industry Association Comments, at 21; CompTel/Ascent Comments, at 3; Consumer Electronics Association Comments, at 3; CTIA Comments, at 2; Global Crossing North America, Inc. Comments, at 7; Information Technology Association of America Comments, at 19; Level 3 Communications, LLC Comments, at 13; Microsoft Corporation Comments, at 14; Motorola, Inc. Comments, at 4; National Cable and Telecommunications Association Comments, at 32; Net2Phone, Inc. Comments, at 12; Nortel Networks Comments, at 14; Nuvio Corporation Comments, at 5; Pac-West Telecomm, Inc. Comments, at 8; Qwest Communications International, Inc. Comments, at 25, 28; SBC Communications Comments, at 25-29; Skype, Inc. Comments, at 3; Telecommunications Industry Association Comments, at 6; Time Warner, Inc. Comments, at 26; United States Telecom Association Comments, at 34; Valor Telecommunications of Texas, L.P. and Iowa Telecommunications Services, Inc. Comments, at 8; Verizon Telephone Companies Comments, at 31; Verisign, Inc. Comments, at 5; Virgin Mobile USA, Inc. Comments, at 4; Vonage Comments, at 14.

¹⁴ See *Pulver Order*, at 15.

¹⁵ See Callipso Comments, at 2-3.

¹⁶ See *Pulver Order*, at 16.

¹⁷ See *Pulver Order*, at 16.

¹⁸ See *Pulver Order*, at 16.

enabled services are properly classified as inter-state in light of the attempts by numerous state commissions to assert jurisdiction over such services.

A. The Commission is Vested with Exclusive Jurisdiction over Information Services.

The limited role of states in regulating information services began over thirty years ago in the *Computer Inquiry* proceedings and have allowed for the explosive growth of the Internet and IP-enabled services.¹⁹ States' attempts to regulate information services were continually rebuffed by the Commission.²⁰ With the passage of the 1996 Telecommunications Act, economic regulation of services like Callipso would clearly conflict with federal policy. Congress expressed its explicit preference for a national policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services" unencumbered by either Federal or State regulation.²¹ To the extent that parties argue that there is any ambiguity about the applicability or intent of this text, courts have continually recognized Congress's intent and have rejected state attempts to regulate information services like Callipso's.²²

Separate and apart from federal preeminence over information services, jurisdictional separation of traffic generated by IP-enabled service providers like Callipso is impractical. As

¹⁹ See *Second Computer Inquiry*, Final Decision, 77 FCC 2d 384 (1980) ("*Computer II*"), modified on recon., 84 FCC 2d 50 (1980), further modified on recon., 88 FCC 2d 512 (1981), aff'd sub nom. *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

²⁰ See, e.g., *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571, 7632, ¶¶ 122-24 (preempting state regulations pertaining to the separation of facilities and personnel in the provision of jurisdictionally mixed enhanced services); *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 5660, n.7 (1989) (finding that "mixed use" special access lines carrying more than a *de minimis* amount of interstate traffic to private line systems are subject to the Commission's jurisdiction).

²¹ 47 U.S.C. § 230(b)(2).

²² See, e.g., *Vonage Holdings Co. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 997, 1001-02 (D. Minn. 2003); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 544 (8th Cir. 1998); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

detailed in Callipso's initial comments,²³ Callipso's IP network contains no circuit-switched components and is capable of accepting and processing communications in IP format regardless of the characterization of the originating or terminating device. Callipso's next-generation network carries commingled data and voice packets characterized such that the Company cannot distinguish between traffic that originated as TDM and traffic that is native Internet protocol communications. Further, over 93% of the traffic carried on Callipso's network is inter-state in nature.²⁴ Clearly, subjecting an IP-enabled services provider to state jurisdiction would not serve the public interest.

B. The Commission Must Immediately Preempt State Regulation of IP-Enabled Services.

It is important for the Commission to immediately and decisively rule that states may not regulate the communications service offered by IP-enabled service providers. Despite the Commission's attempt to stave off the inappropriate regulation of IP-enabled services by state public utilities commissions in initiating this rulemaking proceeding, many states are attempting to regulate IP-enabled service offerings. Recently, Washington State required one provider of IP-enabled services to obtain state certification.²⁵ As a result of that order, the Company ceased to offer services and withdrew from the marketplace.²⁶

The negative effects of state regulation are not limited to this one company. Both Minnesota and New York have attempted to regulate the service offerings of Vonage Holdings

²³ See Callipso Comments, at 3.

²⁴ See Callipso Comments, at 3.

²⁵ See *Washington Exchange Carrier Association v. LocalDial Corp.*, Final Order Granting Motions for Summary Determination, Washington Utilities and Transportation Commission. Docket No. UT-031472 (issued Jun. 11, 2004).

²⁶ See *Washington Exchange Carrier Association v. LocalDial Corp.*, Letter of Arthur A. Butler, Counsel for LocalDial, Corp. to Commission, Washington Utilities and Transportation Commission Docket No. UT-031472, (filed Jun. 22, 2004).

Corp (“Vonage”).²⁷ It was only through the intervention of federal courts that the Company remains unregulated at this time.²⁸ However, the disastrous impact of these decisions on the ability of innovative companies to obtain funding and offer a robust alternative to customers cannot be underestimated. As the CEO of Vonage aptly noted after the New York Public Service Commission released its order concerning Vonage’s service: “So what happens? . . . All the capital that's going to voice over IP? Done. No more. No single investor in their right mind in this country will deploy any capital — none, not one dollar — to a start-up company going after voice over IP.”²⁹

While three states have issued extremely detrimental decisions concerning IP-enabled services, many more have open proceedings or are investigating the provision of IP-enabled services. The state public utility commissions in California, Colorado, Ohio, Oregon, Pennsylvania, Utah, and Wisconsin have or are considering IP-enabled services without yet reaching a final determination.³⁰ Further, the bulk of the comments filed in this proceeding by

²⁷ *Complaint of the Minnesota Department of Commerce against Vonage Holdings Corp. Regarding Lack of Authority to Operate in Minnesota*, Order Finding Jurisdiction and Requiring Compliance, Docket No. P6214/C-03-108 (issued September 11, 2003) (“Minnesota Order”); *Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corporation Concerning Provision of Local Exchange and InterExchange Telephone Service in New York State in Violation of the Public Service Law*, Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation, N.Y. Pub. Serv. Comm’n Case No. 03-C-1285, at 14 (issued May 21, 2004) (“New York Order”).

²⁸ See *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, 290 F.Supp.2d 993, (D. Minn. 2003); Haley, Colin C., *Vonage Records Regulatory Victory*, internetnews.com (Jul. 1, 2004) available at <http://www.internetnews.com/infra/article.php/3376391> (visited Jul. 13, 2004) (citing to Magistrate Judge Douglas F. Eaton’s preliminary injunction in the S.D.N.Y. against the *New York Order*). The decision issuing the preliminary injunction on June 30, 2004 has yet to be published, but can be cited as *Vonage Holdings Corp. v. New York State Pub. Serv. Comm’n*, 04 Civ. No. ____ (S.D.N.Y. Jun. 30, 2004).

²⁹ See, e.g., Donny Jackson, *Vonage CEO: States Will Hurt VoIP Start-Up*, TelephonyOnline (Jun 7, 2004) available at http://telephonyonline.com/ar/telecom_vonage_ceo_states/index.htm (visited July 13, 2004)

³⁰ See e.g., *Order instituting investigation on the Commission's own motion to determine the extent to which the public utility telephone service known as Voice over Internet Protocol should be exempted from regulatory requirements*, Investigation 04-02-007, CA Pub. Util. Comm’n, filed February 11, 2004); *Investigation into Voice Over Internet Protocol (VoIP) Services*, Order Closing Docket, Docket No. 03M-220T, CO Pub. Util. Comm’n (Dec. 17, 2003); *Commission’s Investigation Into Voice Services Using Internet Protocol*, Case No. 03-950-TP-COI, Pub. Util. Comm’n of OH (Apr. 17, 2003); *Oregon Exchange Carrier Ass’n v. Localdial Corp. Disposition: Complaint Dismissed As Moot*, Docket No. UCB 19, Order No. 04-358, Pub. Util. Comm’n of OR (Jun. 25, 2004);

state public utilities commissions reveal a desire of many more states to subject such services to state jurisdiction.³¹ IP-enabled services promote the continued deployment and adoption of broadband facilities and services. Congress has mandated that the Commission encourage the deployment of advanced telecommunications capability to all Americans by utilizing measures that “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing. . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”³² Accordingly, it is imperative for the Commission to rule that IP-enabled services are subject to the exclusive jurisdiction of the Commission so as to avoid stifling the continued growth of this fledgling industry.

III. VOIP IS QUICKLY BECOMING THE ONLY COMPETITIVE ALTERNATIVE TO THE RBOCS AVAILABLE TO CONSUMERS

In light of the continuing decline in the CLEC market, VoIP providers, like Callipso, are increasingly becoming the most promising technologies for delivering the benefit of competitive prices and innovative services to consumers in the telecommunications marketplace. Indeed, in many markets, VoIP is or will soon be the best, if not sole, competitive option available to consumers.

Investigation Into Voice Over Internet Protocol As a Jurisdictional Service, Docket No. M-00031707, PA Pub. Util. Comm’n (May 1, 2003); *Investigation in the Matter of Voice Over the Internet Telephone Service (VoIP)*, Order Opening a Docket, Docket No. 04-999-02, Pub. Serv. Comm’n of UT (Jan. 22, 2004); *8x8 Announces Receipt of Notification From Public Service Commission Of Wisconsin*, Press Release of 8x8, Inc. (Sept. 11, 2003) (notifying 8x8, Inc. that Wisconsin Public Service Commission believes its VoIP service is being offered in Wisconsin without certification as an intrastate telecommunications provider.).

³¹ See, e.g., Cal. Pub. Utils. Comm’n Comments, at 34-38; Minn. Pub. Utils. Comm’n Comments, at 11; Missouri Pub. Serv. Comm’n Comments, at 9; New York Dept. of Pub. Serv. Comments, at 9; Pub. Utils. Comm’n of Ohio Comments, at 18-28; Utah Div. of Pub. Utils. Comments, at 4; and Virginia State Corp. Comm’n Comments, at 9.

³² 47 U.S.C. § 157 n. a.

As the Commission is aware, in sharp contrast to the increasing number of CLECs entering the telecommunications market following passage of the Telecommunications Act of 1996, events over the last few years have produced a significant decline in the number of CLECs in many markets. As a result, Congress' expectation of the emergence of a strong competitive local exchange market have not been fully realized. Just as such a market was beginning to develop, the decline in the financial markets beginning in 2000 forced many CLECs out of the market leaving consumers with fewer choices for their telecommunications needs. More recently, on the tail of the D.C. Circuit's vacatur of the Commission's *Triennial Review Order*, several national CLECs announced plans to discontinue service in a number of markets.³³ The continuing trend of federal and state decisions harmful to CLECs is likely to further decrease the number of CLECs existing in the market and their willingness to continue providing services to the competitive VoIP services industry, enabling the connectivity to IP networks of American consumers without broadband connections, contrary to the desires of the RBOCs. As a result, consumers are left with few or no alternatives to the RBOCs. VoIP provides an opportunity to fill this gap; however, unless VoIP is permitted to develop and reach consumers, this opportunity will be quashed before it matures. The Commission must implement a regulatory regime that permits VoIP to develop and reach its full potential.

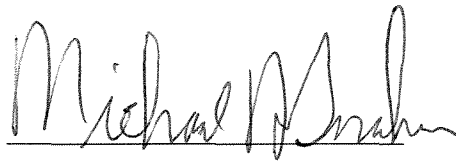
IV. CONCLUSION

For the foregoing reasons, Callipso respectfully requests that the Commission find that IP-enabled services remain exempt from access charges and direct the RBOCs and other LECs to make available to VoIP providers PRIs at just and reasonable rates (*i.e.*, without access charges).

³³ See *AT&T to Stop Competing in the Residential Local and Long Distance Market in Seven States*, News Release of AT&T, available at <http://www.att.com/news/item/0,1847,13121,00.html> (Jun. 23, 2004); *AT&T Quits Competition in 7 States*, South Florida Business Journal, available at <http://losangeles.bizjournals.com/losangeles/stories/2004/06/21/daily16.html> (June 23, 2004).

Callipso further requests that the Commission reiterate that the *AT&T Order* was limited to the facts described in AT&T's Petition and was not intended to prejudge the *IP-Enabled Services NPRM* treatment of all varieties of VoIP services, including the many different versions of "phone-to-phone" VoIP services. Callipso also respectfully requests that the Commission rule that all IP-enabled services are jurisdictional interstate services and thus are subject to the Commission's exclusive jurisdiction.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael P. Donahue", written over a horizontal line.

Michael P. Donahue
Joshua S. Lamel
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Telephone: (202) 424-7500
Facsimile: (202) 424-7645
E-mail: MPDonahue@swidlaw.com
JSLamel@swidlaw.com

Counsel for Callipso Corporation

Dated: July 14, 2004